



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2016-0477; FRL-9543-01-R8]

Air Plan Approval; Montana; Administrative Rule Revisions: 17.8.334

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is taking final action to approve a revision to Montana's State Implementation Plan (SIP). On July 6, 2016, the Governor of Montana submitted to EPA a revision to the Montana SIP that removed one section of the Administrative Rules of Montana (ARM) pertaining to aluminum plants. In this document, EPA is finalizing approval of the removal of this section from the SIP. EPA determined the provision was inconsistent with Clean Air Act (CAA) requirements and EPA issued a SIP call for the State to revise the provision on June 12, 2015. Removal of this provision corrects the deficiencies identified in 2015 related to the treatment of excess emissions from aluminum plants and fully satisfies the SIP call issued to Montana.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2016-0477. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Ellen Schmitt, Air and Radiation Division, EPA, Region 8, Mail Code 8ARD-IO, 1595 Wynkoop Street, Denver, Colorado 80202-1129, telephone number: (303) 312-6728, email address: schmitt.ellen@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On February 22, 2013, EPA issued a *Federal Register* notice of proposed rulemaking outlining EPA’s policy at the time with respect to SIP provisions related to periods of startup, shutdown, or malfunction (SSM). EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.¹ For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction” (80 FR 33839, June 12, 2015), hereafter referred to as the “2015 SSM SIP Action.” The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP

¹ State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016. With regard to Montana, in the 2015 SSM Action EPA issued a SIP call for ARM 17.8.334 because the Agency determined that it was inconsistent with CAA requirements because it contained an automatic exemption for emissions during startup and shutdown events. The detailed rationale for issuing the SIP call to Montana can be found in the 2015 SSM SIP Action and preceding proposed action.

On July 6, 2016, the Governor of Montana submitted a SIP revision to EPA for approval that would remove ARM 17.8.334 from the SIP.² In a document published on April 6, 2017, EPA proposed to approve Montana's SIP revision.³ As discussed in the proposal, EPA's proposed approval of the removal of ARM 17.8.334 from the Montana SIP was consistent with the Agency's 2015 SSM SIP Policy. A more detailed discussion of EPA's determination that Montana's SIP revision was adequate to correct the deficiency identified in the 2015 SSM SIP Action can be found in the proposed rule.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.⁴ Importantly, the 2020 Memorandum stated that it "did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act."

Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Montana in 2015. It also did not alter EPA's prior proposal from 2017 to approve the Montana SIP revision at issue in this action. The 2020 Memorandum did, however, indicate

² The State rulemaking that repealed ARM 17.8.334 also repealed two other sections of Montana's rules, including ARM 17.8.335, which allowed aluminum plants to exceed applicable limitations during maintenance periods and ARM 17.8.772, which pertained to mercury allowance allocations under cap and trade budgets. Neither ARM 17.8.335 nor ARM 17.8.772 were approved into the SIP and therefore were not included in Montana's July 6, 2016 SIP submittal to EPA to remove them from the SIP. Therefore, neither ARM 17.8.335 nor ARM 17.8.772 are not at issue in this action.

³ 80 FR 33840.

⁴ October 9, 2020, memorandum "Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans," from Andrew R. Wheeler, Administrator.

EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).⁵ As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including minority, low-income and indigenous populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.⁶ The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the Agency takes action on SIP submissions, including Montana's SIP submittal provided in response to the 2015 SIP call for which EPA has already proposed approval. Consistent with that stated EPA intent and the return to the policy outlined in the 2015 SSM SIP Action, EPA is proceeding to take final action on its 2017 proposal to approve the Montana submittal, as described in the remainder of this document.

II. EPA Response to Comments

The comment period for EPA's April 6, 2017 notice of proposed rulemaking was open for 30 days. Notably, although over four years have elapsed since the comment period closed, EPA is taking this final action based on comments received during that comment period. No

⁵ September 30, 2021, memorandum "Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy," from Janet McCabe, Deputy Administrator.

⁶ 80 FR 33985.

additional comment period is needed because nothing in the intervening time period – including the issuance and subsequent withdrawal of the 2020 Memorandum changed the basis for EPA’s proposed action. Accordingly, the April 6, 2017 document provided the public with a full opportunity to comment on the issues raised by the proposed action. EPA received one adverse comment on this proposed action from a group called “The SSM Coalition.” EPA also received a comment from an anonymous commenter expressing support for approval of the proposed action.

Comment: The SSM Coalition did not discuss the details of EPA’s proposed action on Montana’s SIP, but more generally argued that it would be inappropriate for EPA to take final action on any SIP revision driven by the interpretations set forth in the 2015 SSM SIP Action, including the Montana proposal. The commenter referenced consolidated challenges to the 2015 SSM SIP Action filed in the D.C. Circuit (*Walter Coke, Inc., et al. v. EPA*, D.C. Cir. No. 15-1166), specifically citing EPA’s April 18, 2017 motion asking the court to indefinitely postpone the oral argument so that new-at-the-time EPA political leadership would have adequate time to fully review the 2015 SSM SIP Action. The commenter asserted that EPA should defer action on the Montana SIP because, at the time of EPA’s proposed approval of the Montana submission, EPA was reviewing the 2015 SSM SIP Action and the D.C. Circuit had not ruled on the challenges to the rule. The SSM Coalition’s full comment can be found in the docket for this action.

EPA response: The Agency acknowledges that there exist pending challenges to the 2015 SSM SIP Action in the court. However, there is no requirement or expectation that EPA must postpone action while awaiting a court decision. Montana has submitted a SIP revision to the Agency that is fully approvable for the reasons outlined in the proposal document. As a result, EPA has determined that it is appropriate to take action to approve the State’s SIP revision in accordance with applicable CAA requirements. Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal

regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). The commenter has pointed to no alleged deficiency or other aspect that would lead the Agency to determine that the SIP revision should be disapproved or that full approval of the SIP revision is not otherwise appropriate.

As outlined in EPA's 2015 SSM SIP Action, and recently reaffirmed in the 2021 Memorandum, EPA is implementing policy consistent with that outlined in the 2015 SSM SIP Action. That policy aligns with previous court decisions, including the U.S. Court of Appeals for the District of Columbia Circuit-issued ruling in 2008 that found that inclusion of SSM exemptions in CAA section 112 standards is not allowed under the CAA due to the generally applicable definition of emission limitations.⁷ It was in light of the 2008 court case, as well as concerns about the public health impacts of SSM, that led EPA in its 2015 action to clarify and update its SSM policy (2015 SSM Policy) to indicate that automatic exemptions like the one at issue in today's action will generally be viewed as inconsistent with CAA requirements.

As the commenter noted, an April 18, 2017 motion by EPA asked the court to indefinitely postpone the oral argument so that new-at-the-time EPA political leadership would have adequate time to fully review the 2015 SSM SIP Action.

The comments regarding EPA's 2017 motion indicating that it is reviewing the 2015 SSM action are now moot. The D.C. Circuit lifted the abeyance on the litigation concerning the 2015 SSM SIP Action on December 17, 2021. As outlined in EPA's request to lift the abeyance⁸ and in the 2021 Memorandum, EPA is no longer reviewing the 2015 SSM Action. Under the 2021 Memorandum, EPA reinstated its prior policy that SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally would not be approvable if included in a SIP submission. The 2021 Memorandum notes, among other provisions, CAA section 110(l)'s procedural requirements governing SIP

⁷ *Sierra Club v. Johnson* 551 F.3d 1019 (D.C. Cir.2008).

⁸ See Declaration of Joseph Goffman, *Sierra Club v. EPA*, No. 20-1115 (D.C. Cir. November 3, 2021), included in the docket for this action.

amendments, section 302(k)'s requirement that all emission limitations apply on a “continuous” basis, and the substantive stringency requirements applicable to emission limitations pursuant to sections 165, 172, and 173.

III. Final Action

For the reasons explained in the 2017 proposal, EPA is fully approving Montana’s July 6, 2016 SIP submission removing ARM 17.8.334 from the Montana SIP. The Agency’s approval of this submission fully corrects the inadequacies in Montana’s SIP that were identified in the EPA’s 2015 SSM SIP Action.

IV. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference ARM regarding the removal of 17.8.334 from Montana’s SIP, as discussed in section I of this preamble. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference in the next update to the SIP compilation.⁹

V. Statutory and Executive Orders Review

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as

⁹ 62 FR 27968 (May 22, 1997).

meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial

direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: February 4, 2022.

KC Becker,
Regional Administrator,
Region 8.

For the reasons set out in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart BB—Montana

§52.1370 [Amended]

2. In §52.1370, the table in paragraph (c) is amended by removing the entry “17.8.334” under the heading “(ii) Administrative Rules of Montana, Subchapter 03, Emission Standards”.

[FR Doc. 2022-02737 Filed: 2/9/2022 8:45 am; Publication Date: 2/10/2022]